IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISCELLANEOUS APPLICATION NOS. 125 AND 126 OF 2004

Employees State Insurance Corporation
Represented by Insurance Inspector E.S.I.
Corporation Regional Office Goa
46 Defence Colony Alto Porvorim Goa. ... Applicant

versus

1. M/s Hotel Manjunath Deluxe
   near Municipal Market
   Mapusa, Goa.

2. Shri M. H. Kamat
   C/o Hotel Manjunath Deluxe ... Respondents

Mrs. A. A. Agni, Advocate for the Applicant.

Mr. V. Menezes, Advocate for the Respondents.

CORAM : N. A. BRITTO, J.

DATE : 12TH AUGUST, 2004.

ORAL ORDER

The Complainant(Applicant herein) seeks leave to appeal against Judgments/Orders dated 10th December, 2003, of acquittal passed by the learned Judicial Magistrate, First Class, Panaji, in Labour Criminal Cases Nos.1372/96/C and 1373/96/C.

2. The Accused(Respondents herein) were prosecuted by the Complainant under Sections 85(a)(in L.C.C No. 1373/96/C) and 85(e)(in L. C.C No.1372/96/C) of the Employees' State Insurance Act, 1948 (Act, for short) on the allegations that the Accused had failed to **pay the contributions for the period of December, 1995 to February, 1996 and failed to file returns for the period commencing 30th September, 1995, on or before 12th November, 1995.**

3. The complaint was filed at the relevant time by one Insurance Inspector known as Sukhwani but who was examined in support of the said complaint at the time of the trial is another Inspector by name Shri Naik.

4. It appears that at one stage, A2 Kamat, filed an application dated 5th March, 2002, stating that A2 Kamat, was the owner of A1 Hotel and pleaded guilty to the charge. However, the said application or for that matter the plea taken in the said application came merely to be filed by the learned Judicial Magistrate, First Class, Panaji. In other words, the plea taken in the said application dated 5th March, 2002, was not accepted and remained without being accepted.

5. Subsequently, when substance of accusation was explained to the said Accused on or about 18th June, 2003, the said Accused pleaded

not guilty. In fact, one does not know as to whom the said substance of accusation was explained i.e. to say whether it was explained to A2 Kamat, either as an occupier or principal employer of A1 Hotel or not. The Complainant himself appears to have been in the dark as not to know what was the exact status of the said A1 Hotel i.e. whether it was a firm or a Company or a proprietorship concern though para 2 of the Complaint Case No.1373/96 shows that A2 Kamat is being referred to as a partner as well as the occupier of the factory known as "M/s Hotel Manjunath Deluxe".

6. Be that as it may, the Accused pleaded not guilty and claimed to be tried and in the said trial, as already stated who was examined is not the Inspector who had filed the complaint on behalf of the said Corporation but another Inspector by name Shri Naik, who it appears was not at all conversant with the facts of the case either from his own knowledge or for that matter based upon records

7. In acquitting the Accused, the learned Judicial Magistrate, First Class, Panaji, has made a number of observations but at least on two counts which have been duly considered by the learned Judicial Magistrate, First Class, the acquittal of the Accused can be certainly justified.

8. Certain provisions of the Act are required to be noted to

dispose off the applications for leave to appeal.

9. Section 85 of the Act provides for punishment, and, inter alia, provides that if any person:- (a) fails to pay any contribution which under this Act he is liable to pay or (e) fails or refuses to submit any return required by the regulations, or makes a false return, he shall be punishable if the offence is under Clause (a) with imprisonment for a term which may extend to three years but it shall not be less than one year, in case of failure to pay the employee's contribution which has been deducted by him from the employee's wages and shall also be liable to fine of Rs.10,000/- and in case of Clause (b) with imprisonment for a term which may extend to Rs.4000/-, or with both.

10. Section 86 deals with prosecutions, and, Sub-Section 1 thereof provides that no prosecution under this Act shall be instituted except by or with the previous sanction of the Insurance Commissioner or of such other Officer of the Corporation as may be authorised in this behalf by the Deputy Director General of the Corporation.

11. Section 86(A) deals with offences by Companies, and, sub-section 1 thereof provides that if the person commiting an offence

under this Act is a Company, every person, who at the time the offence was committed was incharge of, and was responsible to, the Company for

the conduct of the business of the Company, as well as the Company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:-

> "Provided that nothing contained in this Sub-Section shall render any person liable to any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence".

12. Sub-Section (2) of Section 86(A) is not relevant to our case. Suffice it to state that at this stage the explanation below Sub-Section (2) of Section 86(A) defines a "Company" so as to mean any body corporate and includes a firm and other associations of individuals, etc.

13. Section 2(17) of the Act defines "principal employer" to mean:-

> (i) in a factory, the owner or occupier of the factory and includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named as the manager of the factory under [the Factories Act, 1948 (63 of 1948)], the person so named;
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> (ii) in any establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf or where no authority is so appointed, the Head of the Department;

(iii) in any other establishment, any person responsible for the supervision and control of the establishment;

14. As far as the first aspect of the case is concerned, it was certainly necessary for the Complainant to prove that A2 Kamat was either an occupier of A1 Hotel in case it was a factory or A2 Kamat was responsible for the supervision and control of A1 Hotel in case it was an establishment. A.W.1, Shri Naik, did not whisper any word as regards the same and on the contrary exhibited his ignorance about the same by stating that he did not even know how many partners there were or which of the partners were looking after the business of A1 Hotel. This being the position and the state of evidence led by the said Complainant, A2 Kamat could not certainly be convicted either as owner or occupier or for that matter as a person responsible for the supervision of A1 Hotel.

15. The second aspect on which the acquittal is based is that the sanction order as required under Section 86(1) of the Act was not produced by the Complainant. Strangely, the record shows that at one stage, it is the Accused who filed an application producing a copy of the

said sanction order claiming that he was provided with the same but the production of the said copy by the Accused cannot exonerate the Complainant from producing and proving the sanction order which was required to be produced by virtue of Section 86(1) of the Act.

16. In this context, Mr. V. Menezes, learned Counsel of the Accused placed reliance on the case of **Regional Director, Employees' State Insurance Corporation, Madras** v. **Balasundaram and another(1998(4) L.L.N. 308).** In this case, one of the objections taken was that sanction order as warranted under Section 86(1) of the Act was not marked as a document **as a condition precedent for prosecuting anyone under the Act. It was also a case where the sanction order was obtained and had formed part of the records but for reasons unknown(like the case at hand), it was not marked as a document. The Madras High Court in this connection observed that the Employees' State Insurance Corporation had either deliberately or for reasons known to himself had failed and neglected to mark the same as a document thus throwing the case of the Complainant at the feet of the Accused resulting in the Accused escaping from the clutches of law since such a legal blunder could not be rectified by any other means in view of the warranting nature of the mandatory provision of the law under Section 86 (1). In my view no conviction was possible in the absence of the said sanction order being produced and proved.**

17. Although, one may not agree with all that has been said by the learned Judicial Magistrate, First Class, Panaji, in the Judgments/Orders of acquittal, the acquittal of the Accused was certainly justified on the two counts which have been discussed by me hereinabove. The Complainant's approach in prosecuting the Accused has been very casual. The Complainant who stepped into the witness box to support the allegations in the complaint did not acquaint

himself with the records and the facts which were necessary **to be stated to prove the allegations in the complaint. The Complainant also did not care to produce the inspection report which was prepared by his predecessor and which might have shown what was the nature of the establishment, who was actually incharge of and responsible for the same and in case the said establishment was a factory, who was its occupier.**

18. In view of the above, I find that these are not fit cases to grant leave to appeal. Criminal Miscellaneous Applications therefore, are rejected.

N. A. BRITTO, J.

RD.